Pages 1 - 100

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

CRISTA RAMOS; et al.,
Plaintiffs,
VS.
KIRSTJEN NIELSEN; et al.,
Defendants.

NO. C 18-01554 EMC

San Francisco, California
Friday, June 22, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

ACLU OF SOUTHERN CALIFORNIA
1313 West Eight Street - Suite 200
Los Angeles, California 90017
BY: AHILAN ARULANANTHAM, ATTORNEY AT LAW

NATIONAL DAY LABORER ORGANIZING NETWORK
674 South La Fayette Park Place
Los Angeles, California 90057
BY: JESSICA KARP BANSAL, ATTORNEY AT LAW
EMILOU MACLEAN, ATTORNEY AT LAW

ACLU OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111
BY: WILLIAM S. FREEMAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

APPEARANCES: (CONTINUED)

For Plaintiffs:

SIDLEY AUSTIN LLP
555 West Fifth Street - Suite 4000
Los Angeles, California 90013
BY: ALYCIA A DEGEN, ATTORNEY AT LAW
AMANDA R. FARFEL, ATTORNEY AT LAW
ANDREW B. TALAI, ATTORNEY AT LAW
MARISOL RAMIREZ, ATTORNEY AT LAW

SIDLEY AUSTIN LLP
555 California Street
San Francisco, California 94104
BY: RYAN M. SANDROCK, ATTORNEY AT LAW

For Defendants:

U.S. DEPARTMENT OF JUSTICE
Civil Div. - Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
BY: RHETT D. MARTIN, TRIAL ATTORNEY

Friday - June 22, 2018 **10:33 a.m.**

P R O C E E D I N G S

---000---

THE CLERK: Calling case C 18-1554, Ramos versus Nielsen.

Counsel, please come to the podium and say your name for the record.

MR. ARULANANTHAM: Good morning, Your Honor. Ahilan Arulanantham for the plaintiffs.

THE COURT: All right. Good morning.

MS. BANSAL: Good morning, Your Honor. Jessica Karp Bansal for the plaintiffs.

THE COURT: Thank you.

MR. MARTIN: Good morning, Your Honor. Rhett Martin for the defendants.

THE COURT: All right. Thank you, Mr. Martin.

Do y'all want to make an appearance?

MS. DEGEN: Good morning, Your Honor. Alycia Degen for plaintiffs.

MS. MacLEAN: Good morning, Your Honor. Emilou MacLean for the plaintiffs.

THE COURT: All right. Thank you.

We are on, first and foremost, this morning for hearing on defendants' motion to dismiss, and I think the first issue we have to address, of course, is the jurisdictional-stripping

provision in 2554a; but before we get into that, I just want to make sure I understand exactly what the theory of the plaintiffs are.

The plaintiffs are challenging not the designation or undesignation of the four countries *per se* as designated under -- for Temporary Protected Status but the change in the rule or interpretation of that statute; is that right?

MR. ARULANANTHAM: That's correct, Your Honor. As to the APA claim, that's correct, Your Honor.

THE COURT: And is the change -- what is the scope of the alleged change? Is it not considering any current and intervening circumstances or disasters or not considering those which have some exacerbating or prolongation of the originating condition? And does that make any difference in this case? I don't know.

MR. ARULANANTHAM: Well, I think if you look, for example, at the Nicaragua designation, in 2012 they specifically say the roads were -- you know, I may be mixing them up. Hold on one moment, Your Honor.

THE COURT: Yeah.

(Pause in proceedings.)

MR. ARULANANTHAM: If you look at the El Salvador designation, Your Honor, in 2012 when they're extending and they say the roads from the earthquake damage have been repaired but there's other problems with the roads.

If you look at Haiti, Haiti is designated because of an earthquake in 2010; but then when it's extended, they look to Hurricane Matthew. Hurricane Matthew is not caused by the earthquake in 2010.

So I think it's clear that there is no way to --

THE COURT: And it was not extended because under the rubric of Hurricane Matthew having exacerbated the conditions of the earthquake? In other words, it in and of itself was a condition that was sufficient to extend TPS?

MR. ARULANANTHAM: The exception that you're describing could, I suppose, swallow the rule. It's difficult at this point to know whether -- you know, how now the government is trying to draw the line to justify the change that's happened; but if you look at the statements that were made by the government officials, and they said, for example, Secretary Kelly (reading):

> "The program TPS is for a specific event. In Haiti it was the earthquake. Haiti had horrible conditions before the earthquake. Those conditions aren't much better after, but the earthquake was why TPS was granted. That's how I have to look at it."

Does that permit consideration of Hurricane Matthew because it has an exacerbating effect on the earthquake? I don't know, but they didn't mention Hurricane Matthew when they terminated TPS for Haiti and they had mentioned it previously.

So whether the government now wants to try and shoehorn what is, we allege, a change by creating a new conceptual framework and saying you can put, you know, the intervening conditions that they used to consider into this box, I think that's going to be a factual -- I mean, that is a factual dispute then, and we're entitled to show that their *post hoc* explanatory theory can't actually capture all of the actual phenomena here.

And so what we're alleging is it used to focus -- permit consideration of intervening conditions. Now --

THE COURT: Irrespective of whether it was specifically tied to exacerbating original condition, some of them were independent of the original condition?

MR. ARULANANTHAM: Yes, Your Honor, that it used to permit them regardless of whether or not they were actually exacerbating, and that now the focus is on the originating condition and you don't look at whether they're exacerbating.

But, again, as I said, if they want to try to shoehorn everything into this, you know, new account of their changed practice, that's a factual dispute and we're entitled to say that, "Oh, Secretary Kelly didn't understand it that way when he terminated Haiti or when he terminated TPS for El Salvador."

Does that answer your question, Your Honor?

THE COURT: Yeah, it does. We may get into some factual questions if we get to, like, Darfur. Sudan, for

instance, that probably has the most extensive analysis of current conditions compared so some other ones. If you look at El Salvador in the 2016 extension, there are a number of things that were referenced, such as water access, coffee rust epidemic, various things that were cited and that were omitted are not addressed in the 2018 termination. I guess that's your point.

So maybe there's a bit of a mixed record here. Some statements are a bit more robust than others, but I just want to make sure I understand the theory of your case.

MR. ARULANANTHAM: Yes, Your Honor.

And to be clear, is what we were saying in the brief we just filed yesterday I guess it was -- it's been a long 24 hours -- if, in fact, we have not adequately pled even for 12(b)(6) purposes that there is an unexplained departure from the prior practice, then we lose on 12(b)(6) for the APA claim, but that has nothing to do with whether there's a subject matter jurisdiction dispute, 12(b)(1) dispute, based on 1254a(b)(5), the jurisdiction-stripping provision. Because for purposes of that, you presume that there is an unexplained departure or a new rule and ask: Would the court have the power to remedy that under the APA if, in fact, there is an unexplained departure?

And so that whole debate about whether or not there's a new rule, it has nothing to do with the subject matter

jurisdiction dispute. It only has nothing to do with whether or not we have stated a claim. So we're entitled to discovery -- if we have stated a claim, if we've gotten that far, then we should get to find out what were the documents that Secretary Kelly had in front of him when he made the statement in his testimony.

Secretary Nielsen made an even clearer one. She said (reading):

"The law really restricts my ability to extend TPS. The law says that if the effects of the originating event" -- so that's a causation issue -- "do not continue to exist, then the Secretary of Homeland Security must terminate."

So what was she looking at when she said that? Was she looking at a memo that said, "Oh, well, if it's an exacerbating condition, if the hurricane causes the earthquake recovery effort to get worse, then you can look at it"; or was she looking at a memo that said "Originating condition, intervening condition"? It's very black and white and we're entitled to find out if there is such a memo; and if there is, obviously, then that would suggest that --

THE COURT: Well, to get there, you have to get past the very first question. That is, assuming, for instance, that your assertions of a new policy or new interpretation are true, and that may be disputed, but assuming that that's been alleged

and adequately alleged, does that escape the jurisdictional-stripping provision? That's what I want to address now. I think that's the most critical question.

And so --

MR. ARULANANTHAM: I'm happy to start, but I think it's their motion so they should probably begin.

THE COURT: Well, it's your motion and I have a couple questions for you, Counsel.

MR. MARTIN: Good morning, Your Honor.

THE COURT: Good morning.

It is fairly clear, is it not, that there is a presumption of review, there's a strong presumption that actions of federal agencies are reviewable but upon a showing of clear and convincing evidence of a contrary legislative intent, that can be overcome?

So you have that presumption, and then you have the presumption about review -- judicial review where constitutional claims have been asserted because that raises separation-of-power questions if you were to find that there is no jurisdiction.

So starting with that and then combining that with the Supreme Court's decision in the *Catholic Social Services* case and the *McNary* case, which seemed to construe the term "determination" to mean determinations in a sort of case-by-case basis. If it's an individual, it's an individual

adjustment situation. If it's a country-by-country under TPS, you look at each determination, but not to general challenges to sort of procedures or more systemic policies or changes, which is what the plaintiffs are alleging here.

MR. MARTIN: Right.

THE COURT: So why would, in view of the presumption, in view of the Supreme Court precedent, which have narrowly construed the word "determination" to mean sort of individual determinations and not systemic sort of issues, why would that preclude judicial review here?

MR. MARTIN: Well, I think there are a couple of reasons, Your Honor. First, 1254a says "any determination" and it would be impossible to separate out the ultimate decision to terminate itself from the various balancing of the factors that the Secretary of Homeland Security had to take into account, that it sweeps in everything that plaintiffs are trying to challenge here, whether the new rule or the ultimate termination itself.

And I think the distinction between the case here and *McNary* and the *Catholic Services* can be seen in terms of the relief. You know, the relief that was awarded in *McNary* was not an award of special agricultural worker status. It was the right to have a redo of an application for that sought status in light of new procedures if they prevail upon their claim that the procedures were in violation of due process.

Here plaintiffs are seeking a rescission of the terminations themselves, and there's no way to reach that without reviewing the determination.

THE COURT: Well, but the ultimate -- if you're looking at the ultimate relief, the rescission -- if what they're seeking is a rescission of these determinations, that would not preclude a redetermination further that's procedurally correct, for instance.

MR. MARTIN: If this were in the *McNary* sort of world, that would be true, Your Honor; but our position is that we're not because, first of all, the new rule doesn't exist, which can be determined on the face of the Federal Register notices alone; and, secondly, even if it did, what they're calling a new rule is part and parcel of the determination itself. There is no way to segregate out the decision to terminate from --

THE COURT: Well, wasn't that true in *Catholic Social Services* and *McNary*? I mean, they were challenging INS's interpretation of certain criteria which determined whether adjustment of status was available or not. I mean, so it informed the determination in the case and, in fact, they said that ultimately in a deportation context, perhaps, you know, these issues could be raised.

So it does -- it is tied up in both situations. The determination of the systemic problem has an impact on the individual case. I don't know how you can separate that in

either one of those.

MR. MARTIN: Well, in *Catholic Services*, for instance, it was a rule making. You know, it was a formal rule that was being challenged or regulation that was being challenged. And in *McNary* it was the formalized procedures about how you would apply for this status.

There's nothing like that here. What we're challenging here is the Secretary's discretionary weighing of the statutory factors that lies -- that has been entrusted to the Secretary by Congress and lies uniquely within the executive's competency over foreign policy.

There is no way to extrapolate from that a rule that says, "You know, this particular factor must be weighed this much and this factor must be weighed another," or how the Secretaries come to that decision. This is -- the determination encompasses, as it says in the statute, any determination, encompasses every aspect of the decision-making process.

And so for --

THE COURT: So you would emphasize the word "any"? Is that why it's broader than just "determination"? I'm not sure what other word could be used when describing -- if you intended to focus on the determination country by country, the designation, I don't know what other word you would use besides "any."

MR. MARTIN: Well, that is emphasizing that it's

all-encompassing in terms of the factors that the Secretaries are considering, and it's also worth noting that the legislative history says none of the decisions with respect to TPS should be subject to judicial review.

THE COURT: But it's not specific in terms of -- again, that sort of echoes the language of the statute. I'm not sure it sheds much light on, for instance, challenges to constitutional or systemic-type issues.

MR. MARTIN: Well, our position would be that "none" and "any" are both sort of unqualified terms that sweep within them every aspect of the decision-making process.

THE COURT: What about the fact that in *McNary* the Supreme Court, as part of its analysis, talks about if judicial review were limited, that is a challenge that's of this nature here where there's a constitutional challenge or to the interpretation status challenge, were to be reviewed, it would be only in the context of, for instance, a deportation?

If we got to the removal proceeding, then there would be judicial review but that would be limited to the administrative record and subject to narrow abuse of discretion review, which the court said would not be consistent normally with a constitutional challenge, which then suggests that Congress did not intend to cabin everything with the jurisdictional-stripping statute and to allow room for a broader constitutional challenge.

MR. MARTIN: Well, whether it's framed as an APA challenge or a constitutional challenge, Your Honor, at the end of the day, the challenge would require the judiciary to make its own independent assessment of the factors and the sufficiency of the explanation given of those factors in the Federal Register notices, and it is that that the jurisdiction prohibition addresses.

THE COURT: Well, I'm not sure I understand that. So you're saying if there's a constitutional challenge, that would be done within the framework of the APA; and, therefore, even if that were allowed, you would still be limited to the record, that the APA scope of review would be no broader than the scope of review on a removal order?

MR. MARTIN: Our position, yes, that the -- if we're talking about the discovery issues for a moment, that the review here must at least start with the administrative record.

THE COURT: Of course, there are exceptions under the APA -- I guess we'll talk about that later -- in terms of when you can go beyond the record.

But, still, the court, notwithstanding all that, in the *McNary* case, in addition to the fact that the term "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions, noted sort of the implications. If you didn't allow for judicial review of constitutional claims or an

interpretation claim that's systemic, the normal route of judicial review would be so constricted in the context of an adjustment of status or removal proceeding that that would be inconsistent with the normal way you adjudicate constitutional or broader claims, and that seems to apply here as well.

MR. MARTIN: Well, the -- again, to -- not to be repetitive, but the existence or not of this collateral practice or policy can be determined on the face of the Federal Register notices, and it is our position that the determinations here are consistent and reflect and mirror determinations and extensions and designations given for TPS by every prior Administration, and that on that fact the new-rule theory is a predicate for subject matter jurisdiction here, and plaintiffs have not sufficiently shown that such a new rule or practice exists.

THE COURT: Well, all right. That gets in part to the merits questions, which we'll get to in a moment, but I'm trying to get to the interpretation question and whether *McNary* and *Catholic Social Services* is really controlling or persuasive to the instant situation.

The court in *McNary* also notes that if Congress really intended to limit review to bar broader statutory constitutional challenges, they could have done so and give an example of the kind of language that Congress could have used. And, again, doesn't that argument apply here?

MR. MARTIN: Well, Your Honor, there's -- different Congresses have chosen different languages over time for judicial jurisdiction-stripping provisions such as the one here. The language here is unqualified. The legislative history confirms that the language is unqualified. And, again, it's hard for us to see how what plaintiffs are calling the policy or practice could be separated from each individual determination.

THE COURT: Well, the court gives an example. It said that the Congress could have used, as happens in the veterans benefits context, barring review as to -- on all questions -- quote, "on all questions of law and fact" as opposed to determination with respect to designation, termination, extension of TPS status.

So, I mean, that's just one of several factors but, I mean, it seems like that argument or that concern would apply here as well.

MR. MARTIN: Congress could have certainly chosen different language, but the language again here is unqualified and broad; and whether it's any question of law or fact or any determination or I think the legislative history says, you know, none of the decisions, those are all unqualified and I think broader than the provisions in -- examples given in *McNary*.

THE COURT: All right. Well, let me hear from the

other side on that point.

One, the breadth of the language, the fact that it would seem to literally apply on its face, "any" -- it says "any determination," and your theory would affect that determination. It may be the challenge is to an underlying broader systemic issue but it does affect any determination.

And how do you respond to counsel's comment about the two Supreme Court cases if you look at the relief sought, it is different in kind than the relief sought here?

MR. ARULANANTHAM: Yes, Your Honor. So, first, with respect to "any," the statute in *Demore v. Kim* said no court may set aside any action or decision by the Attorney General, that it wasn't good enough to preclude review of a challenge to that legislation.

That happened to be on constitutional grounds, but I think the rationale that the court used was to cite *Johnson v. Robison* and *Webster v. Doe*. If you look at the statute in *Johnson v. Robison*, it said "the decisions of the administrator on any question of law or fact under any law of the Veterans Administration." That wasn't good enough to preclude review of a constitutional claim.

And then *Bowen*, which is four years before the TPS statute is enacted -- so it's clearly they're legislating against that background, that backdrop -- *Bowen* is "No findings of fact or decision of the Secretary shall be reviewed by any tribunal

except as herein provided." So that's not "any" but it's "no decision."

These cases are not about whether they use "any" or "a" or "no." They're about the baseline presumption of administrative review of agency action as Your Honor had stated.

And some of these statutes are quite a lot clearer than the statute that we have here. Unless you say that you intend to preclude constitutional claims and unless you specify the scope beyond just determination and say "We're talking about something much broader," the courts do not read those to preclude review of constitutional -- of claims that do not go to the particular determination or decision or whatever you -- whatever you want to call it.

And --

THE COURT: What's an example of language that has been construed to bar -- is there an example of that to bar even systemic or constitutional challenges?

MR. ARULANANTHAM: There's not an example of one that's been read to bar constitutional challenges because the courts have been very careful to avoid the massive constitutional problem and sort of a conundrum of federal courts of whether or not they could entirely strip judicial review of constitutional claims. This statute is not close to clear enough to ask this Court to weigh into that extremely difficult question.

Statutory claims -- certainly Section 1252(b)(9) says no question of law or fact -- and I can't remember the exact wording of it. We cited it in our brief. But it's question of law or fact, and you heard that in some of the other ones, any question of law or fact.

THE COURT: Yeah.

MR. ARULANANTHAM: That, I think, would preclude legal claims, although they have other scope limitations like "under this subsection." You know, so the language Your Honor just was referring to with my friend in *Johnson v. Robison*, the Veterans Administration case, says "any question of law or fact under any law administered by the Veterans Administration."

And so then we've got that, you know, analogy here because we've got "any determination of the Attorney General with respect to the designation, termination, or extension under this subsection." And so, you know, there's a separate question: Well, what does "under this subsection" mean? And under their view, I don't think it means anything actually. I don't understand what their theory is for how that phrase limits this provision.

But to us, it limits it by specifying that the challenge has to arise from this subsection, that is subsection (b), which is the subsection which gives the Secretary the authority to extend or terminate TPS decisions.

And what the statute says is, the Secretary has to

determine -- they use the word "determine" -- that the country no longer continues to meet the conditions for designation. And so that's what the statute bars review of. If you say, "Oh, we disagree about whether the coffee rust/leaf rust epidemic actually has abated sufficiently to permit the return of people to El Salvador," you know, that's the determination that the statute is directing you to in subsection (b) because that's what it says, "under this subsection." If that's your challenge, then there's a jurisdictional problem; that you're challenging whether the country no longer continues to meet the conditions for designation.

We obviously do not challenge that. Our challenge is to the criteria that go into making that determination. And the rule that says that the government has to explain and justify massive revision to the criteria, that arises from the APA. It's the APA that requires the government to explain when it engages in a substantial --

THE COURT: But in the literal sense, changing the criteria as you allege that results in a termination, challenging that in a sense is a challenge to the termination. It's the basis of the termination.

If they had made a factual basis using the same criteria, let's say they took all the conditions and considered intervening hurricanes and volcanoes and droughts and said, "We've looked at it, determined that they're not as severe

anymore, even though that was only 6 months ago or 12 months ago," that would I would think you would concede to be a termination -- a determination that's probably not reviewable if it's done on the facts, an assessment.

MR. ARULANANTHAM: Yes. I'm a little nervous about conceding to any hypothetical without getting it precisely; but if it's a challenge to whether or not the country no longer continues to meet the conditions for designation, if that's the challenge, then it's barred by the statute.

THE COURT: Okay.

MR. ARULANANTHAM: And, Your Honor, this sort of pertains also to your relief question, the other question you had.

THE COURT: Yes. What about that?

MR. ARULANANTHAM: So whether or not somebody is a CSS, whether or not somebody has engaged in a brief, innocent, or casual departure from the United States so that it interrupts their presence and bars them from legalizing -- that's the issue in CSS -- obviously if you say, "Oh, they've wrongly interpreted the phrase 'brief, innocent, or casual departure,'" the effect is that you undo the denial of the legalization application and it's a legal question.

And CSS, the effect of the decision is to revoke I think thousands of denials of legalization of status. And if you look at the Ninth Circuit cases that we cite -- *Immigrant*

Assistance Project, Proyecto San Pablo -- they're extending the application period. That's the relief they're granting and they're letting people who were denied legalization just do it again.

So then -- and this is standard agency law practice; right? The court sets aside the administrative agency's decision and you vacate the decision, and that's the relief that you're granted and that's the relief we seek here: Vacate -- set aside the TPS determinations.

That doesn't mean that they're barred by the stripping statutes. It always depends on the reason why you are saying the action was illegal; and if the reason why the action was illegal is because it was unconstitutional or because there was a problem with the legal interpretation of the underlying rule, then the courts permit it.

And the same is true of *McNary*. You can see it says in the decision they're reopening the cases of people who were denied legalization under the special agricultural RCRA program.

THE COURT: So the scope of relief is analogous. It doesn't make the ultimate determination of removability or not but --

MR. ARULANANTHAM: It just means that -- yes, exactly, Your Honor. You set aside the decision. If they came back and explained their departure in a reasoned way, I mean, that would

be open to the agency to try to come up with a reasoned decision that would justify terminating TPS; or to, I think, perhaps adopt a good faith approach I would say they should reconsider the decision under appropriate legal criteria and they can make a new decision. Your Honor isn't saying under the new APA claim that they can't make a new decision after you set it aside.

Your Honor, there was a little discussion of discovery. I could save it for later or I can talk about it now.

THE COURT: Well, why don't we get through the various claims because discovery may also hinge on the availability of the -- or the viability of the other substantive claims. So why don't we --

MR. ARULANANTHAM: I'll postpone this question about whether the administrative record is sufficient.

THE COURT: Right. Right.

MR. ARULANANTHAM: Does Your Honor have further questions as to the --

THE COURT: No. I want to talk about the due process while you're up here to understand the limits and the theory of your due process claim first on behalf of the citizen children.

MR. ARULANANTHAM: Your Honor, if I may, excuse me. I should have said this at the outset but my co-counsel, Ms. Bansal, will be doing the equal protection and APA and TPS holder claims, I'm doing the children's claim, if that's

permissible with the Court.

THE COURT: All right. That's fine.

What's the limit of your theory? I mean, if the idea that anything that causes -- and it's not -- that causes separation of parent from the child implicates -- I believe you're talking about substantive due process not procedural due process -- implicates a liberty claim that's protected by due process, the government says, well, that would undermine, you know, any kind of -- in any context where a parent is removed because they don't have legal status here or whether a parent is incarcerated or, you know, any such situation. What's the limit of your theory and what is the scope of review? If one were to find a liberty interest here, what is the standard of scrutiny?

MR. ARULANANTHAM: So let me just answer that last question first. The scope of review is the review available in *Moore v. City of East Cleveland*, *Pierce v. Society of Sisters*, which is to say the government has to have a significant interest in forcing the child to choose between their --

THE COURT: Significant interest more than any conceivable interest under typical rational basis review?

MR. ARULANANTHAM: It's sometimes been called rational basis with the teeth as Your Honor noted at the last hearing, and you certainly can win a claim under that as the Supreme Court cases establish, but it's not strict scrutiny.

It's not a fundamental right to be denied that force choice, which is the claim that's rejected, for example, in the Ninth Circuit cases the government relies on.

To go more broadly to this question about what the limiting principle is, there is clearly an interest that every citizen child has in living with their parents and in this country. So there's no question in our view that every child has that interest. That's true regardless of their age and regardless of the reason why the deportation is happening, but it doesn't follow that the immigration law will be destroyed or that there's no way to have deportations of people who have citizen children because this is just a rational basis test; right?

So the government has an interest that comes into bear when you do the balancing. And it doesn't even have to be something that would happen on a case-by-case basis because you can look categorically at the government's interest, like in the Adam Walsh Act in *Gebhardt*. These are people who have been convicted of sex offenses, and so the government has an obvious manifest interest in protecting the children in that case.

You know, here the protection-of-the-children interest runs the other way; right? These are citizen children of this country who are now potentially going to be sent to places that are dangerous, that our country was very recently describing as too unsafe for the return of any of their nationals. So that's

just a factor that goes into the balance.

Similarly --

THE COURT: But if you say that the government can assert a categorical interest to satisfy the *Moore* test, doesn't the government have a categorical interest in enforcing the TPS scheme? And this is a Temporary Protected Status as meant for -- you know, as the purposes set forth in the statute, to provide temporary protection for those from, you know, calamitous-type situations and conditions back in their native country but it's not meant to be a permanent.

So why doesn't the government have at least a rational or significant interest in enforcing its TPS scheme that has been enacted?

MR. ARULANANTHAM: I think this goes to another way in which our claim is different from all of the claims that are addressed in prior cases, which is the relief we're seeking here is also only temporary, and we're only asking that people be allowed to live with their parents and in their country until they reach the age of adulthood.

THE COURT: So would that mean that even if the Secretary had properly made a procedurally proper determination of terminating TPS status, let's say for Sudan, that your claim is that the child would still have a constitutional due process interest not to have his or her parent go back to Sudan even under a properly applied, within the statute, TPS

determination?

MR. ARULANANTHAM: Yes, Your Honor. And if we get past the motion to dismiss, we would expect the Court to address this issue on the merits only if the Court first found that the TPS holders had no claim. So it's only if we lose the APA claim, lose equal protection, lose due process for the TPS holders that the Court would then address this issue.

And, yes, it is a right. Even if -- even if Sudan now no longer meets the conditions for designation, you still have a problem. You have, you know, Hnaida Cenemat wants to play flag football next year. They don't play flag football in Haiti. She's a teenager. She's grown up here her whole life.

Even if the Secretary dots all the Is and crosses all the Ts in terminating TPS, you still have now children having to make this very, very difficult force choice. And so the question the due process clause asks is: Does the government have a significant interest in forcing them to make that choice now rather than allowing them to wait until they become adults when, you know, obviously children leave their, you know, parents and go off into the world once they become adults?

And --

THE COURT: And that would apply regardless of the legal -- putting aside TPS, wouldn't your argument apply regardless of the legal immigration status of the parent?

MR. ARULANANTHAM: No, Your Honor. Again, it turns on

the government's interests in each particular context. So, for example, a person who has been here unlawfully, and the government then has a stronger interest in enforcing the immigration law than it does for people who have lived here lawfully between the --

THE COURT: So that would overcome the due process rights of the citizen child who was born here, for instance, and would be forced with the same sort of Hobson's choice that you posit about having to go back with their undocumented parent to their home -- to the parent's native country or live without that parent? That same Hobson's choice would obtain, but you're saying in that instance there's a significant government interest if the person is not here illegally?

MR. ARULANANTHAM: Well, it's a different question, Your Honor. That is -- I'm not saying that that person always loses or maybe they lose, maybe they win, but it's a different question because the government's interest is manifestly stronger.

And this just goes to one other point I want to make on this, Your Honor. There's no question that this claim that we're raising, there's no case before that has addressed this same claim. It's novel. But that's not surprising because what we have here is a situation where the government -- as far as we can tell, this has not happened in our country's history.

You've got a set of 200 -- actually 400,000 people, all

TPS holders, but, you know, more than 200,000 from these countries, who have lived here lawfully for at least 8 years, and in many cases for decades, so they've lived here lawfully for 20 years and now there's not any allegation that they individually did anything wrong.

THE COURT: That's not the criteria. That's not what TPS is set up for. It's not about wrong or right behavior. It's about conditions -- temporary conditions in the native country.

MR. ARULANANTHAM: Yeah, absolutely, Your Honor. This is an argument that even if the statute were properly followed where you've allowed people to live here lawfully for 20 years, that you cannot then -- I mean, people -- often people have children when they've lived in a place for 20 years. And so then it gives rise to different kinds of rights than what we have seen in other cases.

And if the government had repeatedly, for example, say, canceled the green cards of people who were married on the ground that "We don't want to favor those anymore," or said "Children who are adopted no longer can adjust their status, and so we're getting rid of that," then we would have seen cases like this and this issue would have been addressed. Those are actually, I think, closer analogies to what we have here, people lawfully living here for a long period of time -- yes, under a temporary program, it's true, but they're lawfully

living here -- and then through no fault of their own the government seeks to take away their status, which puts their children then into this impossible choice.

And that's the reason why I think it's different from a situation Your Honor describes where, well, if a person has unlawfully lived here for a long time. Well, the government hasn't blessed their presence and so its interest in enforcing the immigration law is greater in that instance.

You know, a person who --

THE COURT: Why is it greater than allowing somebody to come conditionally subject to certain conditions and then determining those conditions no longer apply? Why doesn't the government have that same interest, say, in enforcing that law as it would in enforcing law that restricts entry in the first place?

MR. ARULANANTHAM: And, again, Your Honor, I think it really turns a lot on the fact that this is temporary. The relief that we're talking about that would be granted here in order to vindicate this constitutional right is also still temporary so it doesn't change the -- it doesn't change the temporary nature of the program. It just provides the people who have children, those school-age children -- they'll still be forced to endure a brutal choice but they'll be forced into it once they're adults rather than while they're still children.

And I think that certainly renders it different from all of the cases that both sides have cited for where what people are seeking is the right to live here permanently. So if you look at the suspension of deportation cases -- or in *Gebhardt* it's adjustment of status, in *Morales* it's to adjust through marriage -- these are people -- all of these people are trying to win the right to permanently reside in the United States.

And usually -- *Gebhardt* is an unusual exception -- usually the plaintiff is the noncitizen. You know, and here I think if you look at it from the child's perspective because our plaintiff, the lead plaintiff in this case is Crista Ramos, you know, she's a teenager. She's here in the courtroom today actually as are some of the other children and also their parents in this case. You know, she is a teenager who has grown up in this country. From her perspective, there is no -- there is no government interest in her being forced to be sent to a country that is -- it's the highest murder rate in the world outside of a war zone, El Salvador is, and --

THE COURT: But the action being challenged, that's a consequence of enforcement. I mean, the action is not directly on her. She's not being ordered to be deported. The question is: Does the government have an interest in removing those who no longer enjoy TPS status or any other legal status? And I guess the way you would phrase it is removing them now as opposed to waiting until their child reaches majority age.

MR. ARULANANTHAM: That's correct, Your Honor.

THE COURT: And, you know, I would assume -- I'll give counsel a chance to respond, but I assume the response is, you know, there is an immigration law that sets forth certain requirements and priorities in terms of who can be admitted, under what circumstances, and for how long, and the government has at least a general categorical interest in being able to enforce those laws so long as the laws themselves don't contravene the Constitution. For instance, you know, if there's another constitutional problem, equal protection problem, it's different.

But if it's a lawfully enacted statute, doesn't the government have -- and this is not a compelling-interest test. This is, as you say, rational basis with a bite. I'm not sure exactly what that means, but a very significantly lower standard of review constitutionally.

MR. ARULANANTHAM: Your Honor, I think, if I may, when you say, well, it has to be duly enacted, there may be other constitutional constraints. I think that is the central issue for us as to whether or not we're going to survive the motion to dismiss on this claim.

If the government, for example, could discriminate on the basis of race and say "We want to get rid of all the people who, you know, are" -- I won't use the ugly words -- but, you know, "made some racist statement," and then if Congress wrote

a law that enacted that, the equal protection clause would constrain the government's power to deport people on that basis.

The First Amendment does. There's actually cases that hold that, ***Bridges v. Wixon*** and ***Bridges v. California***.

THE COURT: And so that's where there are particular problems, constitutional problems, with the statute or the ordinance or the Executive Order or whatever it is that's being challenged.

I'm asking as a stand-alone, this due process argument, which assumes there's no other problems in order to be able to assert this claim. Now, if it's dependent on an APA problem, on an equal protection problem, then I can understand that; but if it's a stand-alone and you're saying even if there's no constitutional -- other constitutional problem with the statute, even if it complies with the APA, even if it's administered consistent with the statute, that any termination of TPS status would have to give way to the minor's rights to have their parent with them.

MR. ARULANANTHAM: And let -- that's the point of -- the point I was trying to make, perhaps not articulately enough, earlier was you could have a duly enacted statute that had an equal protection problem or you could have one that was a problem just as applied, like in the First Amendment context, this particular labor organizer or whatever it is; right?

Here, the substantive due process component of the due process clause is another substantive constraint on the government's power to write immigration laws even if they are otherwise duly enacted. They don't come up a lot because the government doesn't do this kind of thing very much; but if the government now wants to force a set of children into this horrific choice, there is a substantive due process body of doctrine. There's plenty of cases that say the family integrity right is fundamental, the right to stay in the country is absolute. There's -- there are cases, we cited them, where you can't force choices.

THE COURT: Why wouldn't that apply to every deportation of a parent?

MR. ARULANANTHAM: Right. So it doesn't apply to every deportation because it only seeks temporary protection. It doesn't -- we're talking about sending people to countries that are -- that have been found to be dangerous, and it's limited to people who are lawfully present for a long period of time. If you're here for less than five years, this doesn't even kick in.

THE COURT: If somebody were here lawfully but lost that right because, you know, of conduct, for instance, lost their permanent residency right or lost whatever, you know, temporary status right, they're here for a period, even if they're here on a student visa or work visa and then that ends

but they had a child during -- if they're here lawfully but at that point that lawful period ends, the visa may be limited to five years or something, are you saying if they've had a child, they can't be removed if they then lose that protection? They've been here lawfully.

MR. ARULANANTHAM: Right. So the lawful -- I mean, there's two different hypotheticals there. The lawful permanent resident, the statute the way it's written, you don't lose your status unless you've done something wrong, you know, all of that, unless you abandon your status. There's a tiny loophole, you know, but for the most part, lawful permanent residents only get deported because they are convicted of crimes.

And that is really telling because if Congress suddenly said "We're going to strip lawful permanent resident status for all of these people" -- I think they would have -- "for no--- not because of any wrongdoing because we're worried about the effect of it on the labor market and we don't care that they have children in high school who are here," then the children might have a constitutional challenge to that, and I think that's actually quite analogous to what we have here.

THE COURT: Well, that's lawful permanence. What if somebody's here lawfully on a temporary status like some kind of visa?

MR. ARULANANTHAM: I think the student visa -- and

this is why we have very deliberately limited this claim to school-aged children. That's both a top barrier, it is once you become an adult, the right no longer -- the interest -- we're not asserting that that interest justifies this -- and also the young -- young age.

If you're younger than 5, we're also asserting that there you're not part of our class. And the reason for that -- there's two reasons for that. You know, one reason is because I think it is much harder for a school-age child to move. I mean, most people wouldn't even move their school-age children from -- you know, in high school from, I don't know, L.A. to San Francisco or something, let alone to Haiti or Sudan. So there's additional trauma on the child.

But the other reason for it, Your Honor, is because the government then has an interest in avoiding, I don't even like to use these words, but like the anchor baby problem; right? That's what these cases are talking about. It's, like, people -- you know, the government's interest, you undermine the immigration law if people have children.

But here, the government can run a temporary program and it can run student visas and it can have worker visas, all these things, for periods before the citizen children become of school-age; and once they become of school-age, it's a more complicated question.

And so, you know, your hypothetical, you know, the narrow

one where I think there might be a similar claim, you know, I don't know, there's a lot of other interests involved but a person who came here on a student visa and stayed here more than five or eight years -- eight is the shortest time we have in this case -- then, perhaps, you know, they would have, you know, a similar argument. And that's really, like, the only hypothetical which I think actually could be, you know, potentially similar to the one that we have here. That hasn't really arisen in the cases much.

THE COURT: That suggests that every time -- I mean, when the government issues some kind of temporary status for somebody, that the interest in enforcing the deadlines and the temporary nature of that is not significant, not rational, not whatever the standard is, enough to override, if they have a child, the child's due process rights to have their -- to stay here and have their parents stay with them.

MR. ARULANANTHAM: Well, I'd say two things about that. First, the government has five years. They can extend TPS once, twice -- these are 18-month extensions -- even three times. When it goes beyond that, when you're telling people "You can live here for more than five years," that implicates different interests for their children. You know, their children that are growing up, that's a 5-year-old who's growing up in this country.

THE COURT: So it almost becomes like an *estoppel*

effect on the government? If the government goes beyond five years, the government risks not being able to control and terminate TPS status at least for those who have children?

MR. ARULANANTHAM: Until they reach the age of majority, Your Honor.

And the alternative, Your Honor, the alternative view, the government's view, and what you'd have to accept, I think, to accept the opposite is that there is no family integrity right here; right? That the immigration law always categorically trumps the family integrity right no matter what.

Bustamante --

THE COURT: Well, in between you say there's a family integrity right that's acknowledged that may be sufficient to implicate due process, but the interests in exercising a validly enacted law that's not tainted in some other constitutional way survives rational basis for review.

MR. ARULANANTHAM: Right. And I guess I don't know why substantive due process in that sense would be subordinated in a way and rendered it weaker somehow than equal protection, the First Amendment, other -- I don't think there's any doctrinal basis for that kind of, you know, lower treatment.

And I also --

THE COURT: Well, yes, there is, because you are asserting under the equal protection clause not just rational basis but strict scrutiny because this is based on racial or

ethnic animus.

MR. ARULANANTHAM: Right. I --

THE COURT: That's a different level of review. And if that is a cognizable claim, if that claim can be heard, you know, if this Court has jurisdiction over it and you're able to prove that, that's a whole different animal.

MR. ARULANANTHAM: Right.

THE COURT: If you were just using regular, rational basis for review, courts have rejected all sorts of classifications in the immigration context in that sense.

MR. ARULANANTHAM: Yes, yes. My point only, Your Honor, is that under the government's view, there is actually no substantive due process right that's enforceable here at all because it's immigration law.

And so in some of these hypotheticals I'd be curious to hear what they think about those. Could the government just get rid of all the, say, adoptions on the basis of people who have gotten green cards through adoptions? They just pass a law tomorrow that says, "Okay. Those are gone"? Or all the marriages that are based on green cards, those are gone?

Say the government has an interest here. It's duly enacted. You can have -- in your deportation hearing you can challenge whether or not you got your green card through adoption or your green card through marriage so you have all the process in the world, but there's no substantive problem

there?

You know, our view is there is a substantive right that's implicated in these cases. And *Bustamante and Cardenas* and *Din v. Kerry*, the cases that are about people who are marrying people abroad, where they're U.S. citizens, they're seeking to marry noncitizens who are abroad. *Bustamante* is very clear that this implicates the substantive -- that's the word they use -- the substantive right to no governmental interference in matters of marriage and family or, you know, something like that, citing the cases that we have been talking about.

So the Ninth Circuit has recognized that there is obviously some substantive right here that has to be balanced, and so then the question is whether these very particular factors, whether people have lived here lawfully, where they're going -- the children are going to be sent to countries that are unsafe, where it's a temporary protection, whether those are enough to alter the balancing calculus here compared to, you know, these many other situations where the interests are different.

THE COURT: All right. Let me hear from the government.

The government does argue in its brief that there's not even a cognizable interest that, if it were to be recognized, is overridden fairly easily. I think the government is arguing there's no due process right at all to be recognized. Is that

the position?

MR. MARTIN: Yes. I mean, that is the first point, Your Honor, that there is no right.

But even if we were in a world where there were some process of the type of *Bustamante* or *Cardenas*, it's important that the standard there was that the government only had to give a facially legitimate *bone fide* reason, and that was the end of the matter.

So this -- you know, the idea those cases would somehow support the types of scrutiny of the Secretaries of Homeland Security's decisions here I think would be unwarranted.

THE COURT: Well, maybe it's an academic -- I mean, in view of that position, it may be academic whether you recognize any due process right to start with. Do you have any response to the hypothetical about green cards being revoked when they're based on marriage or adoption, whether any constitutional right would vest in that situation?

MR. MARTIN: The government's position is that no constitutional right would vest in that position, Your Honor.

THE COURT: But even if it did, you would have -- well, if it did, then you'd have to look at whether there's, I guess as you put it, a facially legitimate valid reason?

MR. MARTIN: *Bone fide* reason.

THE COURT: *Bone fide* reason?

MR. MARTIN: Yeah.

THE COURT: What about the argument that this is not asking for full permanent status but really temporary-temporary status really, a status that would be extended tied to the age of the child; and, therefore, it's not as sort of broad or intrusive as affording, for instance, permanent residence to somebody by marriage or something like that?

MR. MARTIN: Well, I think two things, Your Honor. First, that's inviting this Court to, you know, create basically a new immigration status out of whole cloth, which goes to the second point, which is that these types of fixes are appropriate for Congress; that the concerns that were noted by plaintiffs' counsel are, you know, legitimate concerns but we have a branch of government that is entrusted with remedying that situation, that this is a legislative fix. It's not appropriate for judicial construction of a new type of immigration statute.

THE COURT: All right. Let's move on to the equal protection question, which I'd like to hear from plaintiffs' counsel to make sure I understand the scope of that claim.

Are you challenging the actual termination -- the determination to terminate the status, TPS status, of these four countries both as sort of directly as well as challenging the change in rule as violative or just the change in rule being motivated by improper purposes?

MS. BANSAL: We're challenging both, Your Honor. The

change in rule is one of the elements under *Arlington Heights*. You look to procedural departure and so the change in rule supports the claim of intentional discrimination, but we are not only challenging the change in rule.

THE COURT: But also the substantive determination to terminate?

MS. BANSAL: And not because the conditions in the country are not such as the Secretary found them but because the decision was motivated by intentional race-based discrimination.

THE COURT: Well, the Supreme Court may shed some light --

MS. BANSAL: We were checking our e-mail this morning, Your Honor.

THE COURT: I take it no decision has come down.

So in some ways it's hard to adjudicate this since a large part of, perhaps not all of your claim, your theory of equal protection is based on comments made by the President. And I don't know how much useful it will be to explore the issue since I think the Supreme Court may be looking at that, but it does raise the question of if you -- number one, can you consider those comments made? Are we limited to time frame? Does that extend to comments that were made not proximate in time but a distance away? Can you consider the President's comments made while he was a candidate and not a President?

And what's the end? Is there a point where any action taken in this arena by the President can be deemed not tainted? Is there some purge period?

I assume the court is going to -- may make some comment on that but in case it doesn't, I would like to hear your response to the limits problem.

MS. BANSAL: Under current law, obviously, Your Honor, that's the only way we can answer the question, but the court can consider that range of statements. That the government has an argument here that the statements are not relevant because the ultimate decision-maker was the Secretary, that argument clearly fails under the catspaw theory of discrimination, which is what the court in the Eastern District of New York had in the *Batalla Vidal* case.

THE COURT: Yes. I'm not so concerned with who's making the statement. I'm more concerned with how far back can you go, how much of a causal relationship needs to be demonstrated as a foundation to consider these, and what's the limit.

MS. BANSAL: I understand, Your Honor.

As to the limit, under the *Arlington Heights* test, it's a very sensitive inquiry, I think is the word the court uses. You look at the totality of the circumstances. There is no one factor that is controlling.

We would assume in good faith, Your Honor, that if this

Court were to find that the TPS terminations at issue here were infected by discriminatory animus, that the government would go back and make a good faith effort to redetermine the TPS designations in a constitutional manner. And there is nothing under existing law that would prevent them from doing that even after a finding by this Court about intentional discrimination.

You could look to, for example, the zoning context. There have been, of course, many cases finding that a city made a discriminatory decision to deny a zoning application, and I'm not aware of anyone ever suggesting that the city could no longer deny any zoning applications in the future because that one instance was infected by discrimination. Each decision has to be looked at on its own terms.

THE COURT: So if the subsequent decision is examined under the criteria of *Arlington Heights*, notwithstanding an earlier statement made by a decision-maker, it could -- still it could withstand equal protection scrutiny?

MS. BANSAL: That's correct, Your Honor.

THE COURT: So would the proximity -- what role does proximity in time have to this analysis?

MS. BANSAL: I think proximity is relevant. Under *Arlington Heights*, the Ninth Circuit has been clear that this is -- it's really a question for a trier of fact and any indication of discriminatory intent lead to an issue that can only be resolved by the trier of fact so proximity goes to

that.

Our allegations have a tight proximal connection in that there was a meeting about TPS predated by a week some of these TPS terminations at which the President made statements directly about the TPS holders.

THE COURT: And, as I recall, it was in reference in more particularly to Haiti, TPS holders from Haiti and El Salvador?

MS. BANSAL: Those were the terminations that immediately followed the meeting, Your Honor, but the President's statement -- and I don't want to say it to the Court, but I do think his words were important -- he said, "Why are we having all these people from shithole countries come here?" And a reasonable trier of fact could infer he was speaking about TPS holders in general. That statement was not tied directly to Haiti. He made other comments about Haiti.

THE COURT: I'm trying to remember now. Before he made that comment --

MS. BANSAL: Yes.

THE COURT: -- was the discussion specifically about Haiti and El Salvador?

MS. BANSAL: The discussion was, as we've alleged, Your Honor, as I understood it, about TPS in general. The countries that were coming up immediately were Haiti and El Salvador.

THE COURT: So you would contend that his reference was to all TPS holders?

MS. BANSAL: Yes, Your Honor. And we think that's also supported by the allegations about the pressure that the White House put on the Department of Homeland Security. Even in advance of that meeting in November, we've alleged that the Chief of Staff at the White House called Acting Secretary Duke, put tremendous pressure on her to end Honduras, TPS for Honduras, in the context of saying "The TPS program in general is contrary to the Trump Administration's goals on immigration."

THE COURT: Well, I'm not sure that supports your claim of racial or ethnic or color animus because if it's to end TPS generally as an immigration matter, which raises a question, you know, if there's a general attitude about immigration, you might even call that anti-immigrant sort of sentiment, that's not necessarily racial animus. That could be -- so I'm not sure.

I was puzzled by that reference and I'm not sure how that supports your claim. A general pressure to end and tighten up the TPS program is not necessarily one that's expressly race based.

MS. BANSAL: Let me clarify, Your Honor. And I think you take that pressure is relevant to, one, the President's involvement in the entire process and whether you could hold

the Secretary responsible for the President's animus infecting the process; but it is also relevant because we've alleged that the President's position on the TPS program is due to his animus towards immigrants from nonwhite, non-European countries.

So the TPS holders are from specific countries which the President contrasted to countries like Norway, which are mostly white. So it's not -- our allegation is not that the Administration was opposed to TPS because they're opposed to the program but that TPS was contrary to their overall goals, which were motivated by intentional discrimination towards nonwhite, non-European immigrants.

THE COURT: All right.

MS. BANSAL: May I --

THE COURT: Yeah. Go ahead.

MS. BANSAL: If I could address for a minute, Your Honor, the standard of review.

THE COURT: Yes.

MS. BANSAL: And the government's primary argument here is that rational basis review applies and because the Federal Register itself doesn't make any race-based claims, they should pass rational basis review. Obviously ***Arlington Heights*** -- it's our position that ***Arlington Heights*** applies.

But the government cannot satisfy any standard of review here. They've pointed to no case and we're aware of no case

that has applied rational basis review to a claim of intentional race-based discrimination. But even under rational basis review, a law that's motivated by animus would fail to pass constitutional muster. That's clear from *Cleburne* and *Moreno*.

And as I understand it, the government's response to that is, well, to allege animus in immigration context you need to show outrageous discrimination, and they cite the *AADC* case. That is a case, Your Honor, that is about selective enforcement claims. It's fundamentally different than this claim.

AADC was a situation where you had people who are in violation of the law who are challenging their prosecution for violation of the law on the basis of the prosecutor's motive. The result of that -- the court was concerned that the result of success on that kind of challenge would be to delay prosecution of a violation of law or, in the immigration context, to permit an ongoing violation of law.

Our plaintiffs are not in violation of law. This is not an issue where the government is choosing from among a set of people who are in violation of law who to prosecute and we're challenging their motive in doing that.

And I think the Ninth Circuit in the *Kwai Fun Wong* case was quite clear that *AADC* is limited to that kind of selective enforcement context and that it does not apply when you are challenging denial of an immigration benefit on the basis of

discriminatory animus.

THE COURT: All right. Well, let me hear from the government on that.

Your assertion that the proper standard of review here is the *AADC* standard, why is this -- where is there an assertion of prosecutorial or impingement upon prosecutorial discretion? This is not a prosecution here. This really has to do with the implementation of a statute.

MR. MARTIN: Well, Your Honor, it's important to note that the *AADC* framework has been applied, particularly in the NSEERS cases, to immigration laws that were distinguished on the basis of countries. You know, the NSEERS was the selective registration system, and at least the First and the Seventh Circuits applied *AADC* and that rational basis framework to the requirement that individuals from certain countries have to register.

THE COURT: Well, but didn't that -- wasn't that in the context -- remind me. Was that in the context of either a prosecution or removal proceeding?

MR. MARTIN: Yes, Your Honor. Yeah.

THE COURT: So that makes some difference, does it not? I mean, one could analogize removal -- once you get into removal proceedings, it's perhaps similar to a prosecution and to say that people are selectively being, you know, chosen for removal in a way that is based on some allegedly impermissible

criteria and, therefore, seeking court intervention trying to stop that, it's similar. Maybe it's not a criminal law enforcement but it is a law enforcement action that's analogous to kind of a prosecution for purposes of the selective-prosecution doctrine. So I can kind of see that, but here we're not at that stage it seems to me.

MR. MARTIN: Well, the predicates that would put us in that stage are like the NSEERS cases. You had specific requirements from individuals from specific countries that, you know, were distinguishing based upon national origin in NSEERS; and here you have country-specific determinations that are not about the characteristics of individuals from these countries but are about the conditions in those countries on the ground. And in both cases, the framework is going to be an *AADC* framework because of the immigration context.

THE COURT: Well, but that suggests that any kind of decision, even if it's one based on invidious factors, if it is a predicate to later removal or later some kind of individualized process where there's some sanctioning would be kind of forced under a framework of *AADC* would be a pretty sweeping proposition. That would mean normal constitutional review would be constrained even if you're not actually in a prosecution.

MR. MARTIN: Well, it might be sweeping, Your Honor, but in the context of immigration where you're challenging, you

know, the executive's ability to weigh a myriad of factors -- foreign policy factors, humanitarian considerations, domestic political considerations -- that the deference to that -- to, you know, that decision-making process is what *AADC* and the NSEERS cases, even outside the prosecutorial discretion context, are counseling.

THE COURT: Well, that's two different doctrines. One is concern about the separation of powers and the court not intervening too forcefully in the prosecutorial discretion area, which is one thing. The mantle of immigration law and the deference to Congress' plenary part, that's a different matter. I mean, that's another basis for deference and a court treading very lightly but it's not based on the prosecutorial discretion. So I'm just -- and I think *AADC* is really about prosecutorial discretion, selective prosecution.

MR. MARTIN: Just one thing on that, Your Honor. The reasoning for the deference applies with equal force here because whether it's prosecutorial discretion or the weighing of the country conditions, both are inherently executive functions. So for that reason *AADC* would not be limited to just the prosecutorial discretion context but it would apply also to a context here where you have, you know, an inherently discretionary assessment in consultation with other government agencies about what realities on the ground in a country like Sudan or Nicaragua or El Salvador or Haiti are; that the

rationale for deferring to prosecutorial discretion applies with equal force to -- would apply to equal force to deferring to the discretion in assessing the factors that are relevant to TPS here.

THE COURT: Well, that may be a reason why the statute and Congress enacted a statute to generally bar review of substantive decisions, and I think that's acceded to by the plaintiff. If there was a decision based on analysis of the facts, on the merits, courts are not going to second-guess, you know, sort of the Secretary's assessment of on-the-ground conditions.

But if the decision proves to be motivated by racial animus and not, you know, by an actual assessment of things on the ground, I'm not sure there's a reason for deference there because then the whole reason to defer to the expertise of the agency and the weighing of various considerations, if that's not what's really at play, then there's no basis for that kind of deference.

So, I mean, I think the two sort of dovetail that. Unless you get out of that box and you can prove this was motivated by a reason that's not based on the merits, there would be very, very limited judicial review; but if you can prove that, then it seems to me that normal scrutiny, strict scrutiny would apply to any governmental decision, as would apply to any governmental decision.

What's your view about -- I guess, again, we may find out more within days how we are supposed to assess comments and evidence -- but the fact here that there's proximity between the alleged -- the comments that are cited by the plaintiff, the President's comments about "shithole countries" and comparing TPS countries to, like, Norway as an example, that it was within a short time, I think one week before I think the first decision was made with respect to Haiti, or was it Haiti?

MR. MARTIN: I think I might be confused on the time frame. I think those comments were made after Sudan and Nicaragua.

THE COURT: After?

MR. MARTIN: After.

THE COURT: But before -- it was within a week? I recall that there was a --

MR. MARTIN: I'm fuzzy on the exact time frame.

THE COURT: Within a short time.

MR. MARTIN: Within a short time, yeah.

THE COURT: So, I mean, whatever the -- wouldn't that normally be deemed fairly probative if this were just any other case, comments made by the decision-maker that shed some light on that decision-maker's attitude in connection with the transaction close in time? It seems like that would be given weight in a normal case.

MR. MARTIN: Well, if this were a normal sort of

employment discrimination case, yes, Your Honor; but this is not an employment discrimination context or that other set of context.

THE COURT: But the same logic would apply. I mean, the reason why it's given weight in an employment context or in a zoning context or any other decision-making context is that just logically, you know, the closer in time it is, the more likely it may shed light on what the decision-maker was thinking at the time.

MR. MARTIN: Well, Your Honor, again, this is -- you know, plaintiffs have expressed their view on this argument but we have a Congressionally designated decision-maker who's a Cabinet Secretary who makes these decisions, and that is a reason why this isn't a normal context. And for that reason, the President's comments -- our position is they're irrelevant to the decision-making process here. And, in fact, some of plaintiffs' allegations are actually self-refuting on this. They make a lot of Secretary Kelly's alleged pressure on acting Secretary Duke regarding Honduras. She did not terminate Honduras. Similarly, with Sudan, she extended South Sudan, and Secretary Nielsen has extended Syria.

So when you look at the particular allegations of, you know, discriminatory pressure here, they fall apart under that scrutiny.

THE COURT: Well, that's a factual question, and I

know you've raised that. It sort of shows that there was not perfect control. Even assuming that the President's agenda was to end TPS status for any non-white country, that didn't happen in at least three instances; but the fact that it happened in the other four instances may be evidence to the contrary, but that's an evidentiary question.

I think their theory is that even though the charged decision-maker by statute was the Secretary, if the Secretary was, in fact, acting under the pressure/influence of the President, then as any -- under typical discrimination theory, those who exerted some influence or pressure, their state of mind can be imputed for liability purposes to the ultimate decision-maker.

MR. MARTIN: Well, you know, as you're aware there's other pending litigation on this. You know, the *Casa v. Maryland* case rejected this argument. *Batalla Vidal* has been certified for interlocutory appeal, and there are other courts considering this issue. But in all of these cases, it is our position that when you're dealing with a Cabinet Secretary who has authority to make these decisions as delegated by Congress, that this sort of undue pressure, catspaw theory falls apart.

THE COURT: Simply because that's the person that was designated to exercise the ultimate power?

MR. MARTIN: Yes. That distinguishes it from a case of a middle manager in the employment context or, you know,

these other sort of contexts.

THE COURT: I'm not sure. I mean, ultimately somebody is a decision-maker. In this case it's designated by statute. In many cases you have to figure out who the decision-maker was. Was it the supervisor or the manager or the CEO? But once you've determined who that -- located who that decision-maker is, you also look at those who influenced the decision-maker in determining whether or not there was unlawful discrimination or other invidious type of conduct that was going on.

And so I'm not sure the fact that Congress has identified who the ultimate responsible decision-maker is would insulate and prevent review of who the other influencing factors were and whether or not they were tainted by some unlawful motivation. I'm not aware of, you know, why that would be.

MR. MARTIN: Well, fair enough, Your Honor. You know, this is our position, and we also have a Ninth Circuit decision in DACA that will shed some light on this perhaps.

THE COURT: All right. Let me go to the APA theory then. And let me ask you. I understand, you know, there's a whole question of jurisdiction, whether we even get to this on the merits, but if we were to, and I understand the government's denial that there was a change in rule, there is no, quote, new rule, new interpretation --

MR. MARTIN: Right.

THE COURT: -- but if there is jurisdiction, if a new rule or new interpretation is found to have been applied here that is different and discretely different from the prior process, why wouldn't then that be problematic under the Administrative Procedure Act, particularly under the *FCC versus Fox Television* case that said that the agency has -- you can't depart from prior policy or practice *sub silentio*, you have to at least give good reasons for it, some explanation, go through a process.

MR. MARTIN: Well, the explanations are given, as required by statute, in the Federal Register notices. They are set out there. There is no other source of publication for guidelines or interpretation.

THE COURT: Well, that's an explanation of the substantive decision, why status is being terminated for Haiti and for El Salvador.

MR. MARTIN: Right.

THE COURT: What is not explained, and I know this is hard for you to do because your client denies that there was a change, but if there was a change, there is no explanation why that change was made, why the Secretary is no longer considering, for instance, current conditions.

MR. MARTIN: Not to avoid the question, but on that point, Your Honor, we are not conceding that the Secretaries did not consider intervening conditions.

THE COURT: No, I know that. I know that's a dispute because in some of the termination notices it talks about some current language like in Sudan, for instance.

MR. MARTIN: Right. Right. So just to be clear, we're not conceding that we did not do that.

THE COURT: Right. On the other hand, if you look just on the face of the notices compared to the extension notices, the previous extension notice and the current termination notice, there are a number of factors that were just not addressed. If you look at El Salvador and some of these other countries, a termination -- the extension notice noted certain things and problems, but they were not -- it's just silent in that regard. So sometimes they're addressed, sometimes they're not.

MR. MARTIN: And that would be true for every TPS termination since, you know, the H.W. Bush Administration. I think if you look at them all, you will see that, you know, some are voluminous in their discussion, some are pretty somewhat short.

THE COURT: The prior terminations also omitted discussion of the previous condition that had been cited in the preceding notice?

MR. MARTIN: Right. If you're reading the prior Federal Register notices, you can't discern any pattern of consistency where every single factor that was ever mentioned

in the prior extension is rebutted in the termination. That's just not the way things have been handled.

THE COURT: Well, that does raise a disputed issue. But assuming for the moment that if the plaintiff were able to -- they were able to prevail and show that there was a significant, substantive or, they put it, sudden change, would that not -- wouldn't that be problematic under the APA since there's no explanation for that, no reasons set forth?

MR. MARTIN: No, Your Honor. Again, not getting to, like, the merits of whether this actually happened, none of the cases that plaintiffs cite for the APA claim are like the situation here. They all involve some sort of prior public notice given to the public about how the agency was going to administer or prosecute a particular statute.

There are -- none of the reliance interests that those types of public statements would have engendered are at issue here. And this is a temporary humanitarian program applied by different Administrations over, you know, since I guess 1991. And to try to stitch together a policy based upon inferences in the Federal Register notices and apply one that exists, and then they would be binding on future Administrations unless there was a public statement that they were changing course would be outside the framework of the APA.

THE COURT: Are you suggesting there has to be a sort of proven reliance interest in order to implicate the APA's

requirement of some reasoned explanation for a change?

MR. MARTIN: Not that there's a reliance requirement, but that in all of the cases that plaintiffs cite, you're dealing with formalized public communications, either a proposed rule making or as in ***FCC v. Fox*** you had interpretive guidelines that the FCC was publishing about its fleeting expletive policy. I mentioned reliance in that context because it is there where in that context the Supreme Court in ***Fox v. FCC*** says, you know, the agency has to give some reason to explain what it's doing and notify that it's doing so.

Without any prior express policy, there is -- there would be no requirement to publish on the website or anywhere else how they were administering TPS.

THE COURT: Well, I know you had argued that ***Fox***, for instance, the ***FCC/Fox*** case is different because it concerned formal policies and regulations; but the APA principle about having to at least discuss and explain changes have been applied to practices not just formal policies. In the ***American Wild Horse*** case ***versus Perdue***, I think that was a practice regarding how certain lands were treated. I don't think there was a formal regulation as I recall.

MR. MARTIN: Well, it's not so much there was a formal regulation, but it was a public policy that had been in place for two decades, I believe, or maybe more than two decades.

THE COURT: And -- well, I take it what we're going to

hear from the plaintiffs is that there's been a public policy or practice of accounting for intervening current circumstances before terminating, and that is the change. I mean, it was public in the sense that if you look at all the explanations and the extensions, what the practice was is made evident and was public. So why is that any different?

MR. MARTIN: Well, maybe this just collapses to the merits, that that's just not the case.

THE COURT: Right.

MR. MARTIN: And, Your Honor, also, I know that we started this hypothetical with the proviso that there was jurisdiction, but I just want to reiterate that the APA itself would, you know, deprive plaintiffs -- this Court of jurisdiction over that claim because of Section 1254a.

THE COURT: Right. The jurisdiction-stripping provision.

MR. MARTIN: Yeah, right.

THE COURT: Right, which is where I started because that's a threshold question. And if the government prevails on that, then none of this is cognizable or --

MR. MARTIN: Right. I just wanted to reiterate that point.

THE COURT: All right. Let me hear the response regarding the APA.

MS. BANSAL: Thank you, Your Honor.

I'll start with this question of whether a rule has to be explicitly and formally written down for this general principle that an agency must explain past departures to apply. As Your Honor said, many of the cases that we've cited do not involve that situation, so in ***American Wild Horses*** it was a practice over years. And also the --

THE COURT: Was that practice embodied in any -- or described in any public -- in other words, here there's kind of an implicit -- you are asserting an implicit practice, an implicit policy. In ***Wild Horse*** was that implicit or explicit, the practice of how certain lands were treated?

MS. BANSAL: I think the case most on point with implicit practice is the ***FERC*** case, the ***California Public Utilities versus FERC***. In ***Wild Horses*** the situation was that the agency was taking a very similar position to the government. Here they were denying that there had been any rule that was ever changed; and in rejecting that argument, the court looked in part to practice. So the agency had to count the number of horses that were in this disputed territory, and they said, "In your reports where you count the number of horses, you counted the horses from this middle territory, so clearly you thought the middle territory was part of the reserve."

There was also an original forest plan that was incorporated by reference into another document that said that

the reserve was part of the -- oh, sorry, that the disputed territory was part of the reserve, so the court looked at both things.

The *FERC* case is a case where the rule really was embodied in individual decisions, just as in our case. So the -- over the course of deciding several cases, the issue had to do with whether you could give an incentive to a utility company for being part of a group that it had no discretion to leave. So there were incentives given to electricity companies when they made a voluntary choice to join certain groups, and the question was: Could you give the incentive to a utility company that had no choice but to be part of this group?

And in the past the agency had always denied. In individual cases, the utility company would ask for the benefit and they would say, "No, because your participation in this group is not voluntary so you don't get an incentive to induce your behavior." They changed that not in a formal announcement, but in a decision granting an incentive to a utility company that was part of this group and had no discretion to leave. And so the policy, and the court actually says this in the decision, but the policy that was departed from was embodied in prior decisions.

It's also the case in the *Bonneville Power Administration* case, Your Honor, where the practice that was departed from was that the agency would always fund a fish passage center

whenever this other body had recommended they do so. It was just in a practice. They didn't have any rule always from them when the other body says. It was just a practice, so...

THE COURT: All right. So that brings up the question how clear, and maybe this is a factual dispute here, your theory, your APA theory, and perhaps your -- in part you're seeking to avoid the jurisdictional stripping provision hinges on the existence of a new policy or practice.

What's your response factually to the fact that if you look at earlier terminations, they -- many of them also did not refer to prior extension conditions? And one could argue it looks like, you know, there's no clear pattern here, that you don't always consider all conditions.

MS. BANSAL: Well, Your Honor, when -- the first thing I want to clarify is that this practice of considering intervening conditions and describing the intervening conditions and the extensions and terminations is one that developed over time, so the initial termination and extension notices are quite cursory. There's a giant folder there with all of them. The initial notices in the 1990 cert are quite cursory. It's around 2000 where you start to see more detailed explanations in both the extensions and the terminations.

Obviously you can't have one rule for terminations and one rule for extensions, so you can't only look at one.

As Your Honor has noted, this is a factual question, so to

the extent there's any ambiguity about what was considered at this stage, it has to be construed in the light most favorable to the plaintiffs. But we -- there is a clear difference between the factors, the intervening factors, that are considered before the Trump Administration and after about 2000 because before that the notices just say very little.

But there's a clear difference between the reasons that are given in that 17-year time period and the reasons that are given under the Trump Administration.

We've also --

THE COURT: Well, is it accurate that there were prior terminations that didn't address all of the immediately preceding extension justifications?

MS. BANSAL: The government has cherrypicked a few examples that they have discussed in their brief that they argue show a failure to consider intervening conditions in terminations. At best we think -- we think those are cherrypicked examples and that the overwhelming pattern is to consider intervening conditions in both extension and termination notices.

To the extent there is no pattern, and the government sometimes considers them and sometimes doesn't, that would also be a violation of the APA to apply one rule in one case and another rule in another case arbitrarily.

THE COURT: I don't recall that being a theory you

advanced. I thought your theory is that there's a change, not that there's been inconsistencies from time to time, therefore prior Administrations may have violated the APA as well. I thought your position is that this Administration has violated the APA because of a sudden and new change. That's a different theory.

MS. BANSAL: You're correct, Your Honor, and I apologize if I was confusing. That is our position.

In response to the government's argument in our opposition brief, we point out that if the Court accepted their version of the facts as true, and sometimes factors are considered and sometimes they aren't, that is a different APA violation. That's not the one that we have alleged here, but that also would violate the APA.

THE COURT: Are there any cases that say how much of a change, how clean, how categorical a change must be in order to invoke the requirement of providing good reasons, et cetera, et cetera, for that? If there's a subtle shift from, you know, 60 percent explanation to 40 percent explanation instead of zero to 100 or 100 to zero, are there any cases that say at what point, how significant, how substantial, how sweeping, how complete must a change be before the APA is implicated?

MS. BANSAL: There aren't any cases I'm aware of, Your Honor, that directly address the question, but you can look at the changes that have -- where the court has applied

this test. So in the *Fox* case, for example, the change was is one expletive enough to count as indecency or could two count as indecency. And the Court explicitly notices -- have noted that the agency didn't change the definition of "indecency." It just changed how it was applied.

There's also, in the *Bonneville Power Administration* case, Your Honor --

THE COURT: But there you could see what the change was in a fairly graphic way; right? I mean, here you're looking at a pattern. I mean, as you say, I mean, they cherrypicked, but if they can cherrypick enough, then it begins to look like not so discrete a pattern, if there's enough examples of that.

MS. BANSAL: So the question is not how -- I apologize, Your Honor. I think I was misunderstanding the question -- not how subtle the change has to be, but how clearly the change has to be expressed.

THE COURT: I guess that's a better way of putting it, yes.

MS. BANSAL: We have -- we think that the change is clear, Your Honor, from the notices, but we have also alleged numerous statements that reflect a change. And so it's not just the notices, but it's, you know, for example, Secretary Nielsen saying the law does not allow me to look at the conditions of a country writ large. Compare that statement

with pre-Trump extension and termination notices. There is a clear change.

THE COURT: All right. To the extent that raises a factual issue, why isn't this -- explain to me again why is this not -- going back to the first question -- a fact-based challenge to jurisdiction as opposed to facial challenge? And if it's a fact-based challenge, doesn't this Court have the -- isn't it charged with having to resolve that fact?

MS. BANSAL: Because the government's position, Your Honor, is that there is no jurisdiction over our claims regardless of whether we can prove a new rule or not, their position is that the Court doesn't have jurisdiction to consider whether there has been a rule change.

THE COURT: So it's the nature of their challenge that it's saying even if true, there's still no jurisdiction?

MS. BANSAL: That is how I understand it, Your Honor. We briefed this in our brief from yesterday, and my co-counsel may be able to elaborate about that.

THE COURT: All right. Well, let me clarify it from the government. I know that is your argument. You've made that argument, but -- and is that the gist of your jurisdictional challenge, that even if they could prove it, this statute is so broad and sweeping and unconditional, that it bars judicial review?

MR. MARTIN: That is our position, Your Honor, yes.

And there was one thing I might add to the APA discussion.

THE COURT: Yeah.

MR. MARTIN: This theory of bringing this within the rubric of the APA threatens to imperil the TPS framework itself because it would not just be terminations that would then be subject to litigation, it would be the designations in the first instance or refusal to designate. You could imagine a situation where a future Secretary designated a country for TPS and someone who was opposed to that for whatever reason brought an APA lawsuit saying that, you know, the factors weren't considered in the way that they were by prior Administrations, that there was a departure from practice. Each of the legal theories advanced here would imperil the TPS framework itself by allowing that sort of challenge. And so I think that that is -- that's another reason why Congress added or barred judicial review here, but I think that that is a consequence of, you know, the way that this case has been litigated if it were allowed to go forward.

THE COURT: All right. Let me get a response to that. Wouldn't your theory have implications for not just terminations but extensions or designations in the first place if any change in -- alleged change in criteria could implicate scrutiny?

MS. BANSAL: It's hard to think of who would have standing or how the challenge to the extension would come up,

but the jurisdictional argument that we present, Your Honor, certainly is not limited to terminations. It applies to --

THE COURT: I'm talking about the APA argument, the substantive APA argument.

MS. BANSAL: Prior. Prior. Yes, the rule change, the rule change argument that you can't change rules without giving an explanation is not limited to a termination. Although in the termination, there are unique reliance interests, which are relevant as far as how detailed the explanation needs to be. And I think the government argued that there were no reliance interests because this policy is not written down, but certainly the TPS holders have come over the years to rely on the fact that their country's TPS designations are extended. They are aware of the conditions in their country, and they have come to rely on the fact that they are not going to be made to return to their countries until those conditions have improved. And they have come to rely on the fact that that assessment is made looking at the conditions written and not in this narrow way.

THE COURT: Well, let me ask you about that now that you've raised that point. Aren't those expectation interests as opposed to reliance interests? Usually reliance interest is a change in position in reliance on something, something you've done that you would not have done otherwise, and I'm not sure what that would be here. People may expect that they are going

to be able to stay here longer, but it is a temporary -- nobody was promised permanent status here. So I'm not sure what -- there's no example in the complaint of what people have done in reliance that they would not have done had they known. It's really an expectation that is based on expectation that certain rules would apply before the TPS status would be terminated.

MS. BANSAL: It's a reliance interest, Your Honor, and the example that we give in the complaint that I think is most close to this question is that plaintiff Hiwaida Elarabi, for example, she's held TPS for 20 years. In 2015 she made a decision to invest in a restaurant. She made a decision to start her own business. When the TPS termination was announced, she sold that business because of the uncertainty, and she sold it at a loss.

So people are making decisions about their lives that are different from the decisions they might make if they thought they would have to return to their countries before conditions in their country had actually significantly improved.

Another example, Your Honor, is we have several plaintiffs who are, you know, college students. We have plaintiff Maria Jose Ayala Flores who has decided to study math at college because she wants to be a math teacher. If she thought that she was going to have to return to her country, she might make a different decision about what to study. So we do think they are reliance interests and not just expectation interests,

Your Honor.

THE COURT: What would be the reliance interest there? Studying a different subject or not going to college or what? I'm not sure I understand it.

MS. BANSAL: I think the choices that are made could be, yeah, to not go to college and to instead get a degree in whatever job is most in need in the other country.

Decisions are being made with the assumption that people are able to stay and won't have to return to their countries until conditions have improved, and I do think people would make different decisions about what to study, about whether to go to college, about what job to take, about what business to invest in.

THE COURT: I guess the hard thing about that -- I mean, I understand what you're saying. I think the hard part about that is that it's not like, you know, you're guaranteed to stay here 10 years and now we're shortening it to 5 years. It's always 6 months, 6 months, 12 months, 12 months, maybe 18 months. And it's subject to periodic review.

And especially given the lack of judicial review on the merits, it's not so much based on, you know, objective conditions on the ground by itself, but the Secretary's assessment of that, which is largely unreviewable under this statute. So reliance interests seem to be tempered to some extent.

MS. BANSAL: In a practical way, the reliance interest is the assumption that the Secretary -- maybe the decision is not reviewable, but it will be made in a nonarbitrary way, and that there won't be this sudden change when -- from the plaintiffs' awareness of what's going on in their country nothing has really changed, but the decision that comes out is completely different and is not in line with the decisions that have been made in the previous 20 years.

THE COURT: All right. Let's talk about the discovery issues. I know some of this is sort of conditional on what this Court decides on the merits, but if we assume for the moment that I find that the jurisdictional-stripping provision of 1254a does not preclude either the constitutional claims or the challenge to the procedural broader systemic change in criteria that the plaintiff allows, that determination is to be narrowly construed to mean the individual country-by-country determination, which is fact based, and that at least there's an APA claim that's been stated once we get past the jurisdictional issue and at least, as alleged, an equal protection claim.

I'm less certain about the due process claims. But assuming there is a constitutional claim and an APA claim and it goes forward, what do we do about discovery and how does this fit into a larger time frame in terms of what is happening? Because we have to look forward in terms of what

the sequence of events are. I guess the first TPS holders that will be affected are those from Sudan in November and then followed by -- what's the next country?

MR. MARTIN: Nicaragua.

MR. ARULANANTHAM: Nicaragua in January, Your Honor.

THE COURT: Nicaragua in January. And should this case proceed, we need to give ourselves enough time to adjudicate whatever we're going to have to adjudicate, and I want to be able to do that in time enough so that whoever doesn't prevail will have a chance to seek appellate relief or appellate review. So I don't want to wait until the last minute, which is one reason why I said at the first CMC that I want to make sure that we don't get hung up on discovery or the record and not be able to address the merits of these claims.

So I guess the first question I have with respect to this dispute that's ongoing with regard to discovery is assuming that an administrative record has to be put together and produced, what is in the administrative record? And the administrative record generally should include things that are broad, anything that was directly or indirectly considered by the agency decision-makers. And so that would seem to encompass not just formal communications, putting aside privileges, but it would -- it would -- anything that was considered directly or indirectly, and that would include things that were considered and seen by those who helped the

decision-maker under the law as I understand it.

So I want to get the parties' sense. And if that's the case, I'm not sure what else outside the record would be needed here. But let me hear from the government first because you've begun to look at the potential administrative records, I understand.

MR. MARTIN: Begun compiling them, yes, Your Honor.

THE COURT: Yes.

MR. MARTIN: So as you said, it would be whatever the Secretary herself considered; and then from whatever who was advising the Secretary, what they considered. And at this point we've identified 15 people who would have had input to the Secretaries at one time or another and are looking through their materials to see, you know, what they relied upon, what they have that might be -- comprise part of the record.

It is -- because we're still reviewing the materials, we have, I think, as we mentioned in the letter, down to about 35,000 materials from 20 custodians. You know, obviously those are not all part of the record, but that's the universe of materials that we're reviewing. And we're also interviewing other people who might have potentially had some input that would have met the criteria of someone who was advising the Secretary.

THE COURT: Now, your letter refers to including formal recommendations and assessments as part of the

government agencies but will exclude informal deliberations.

MR. MARTIN: Yes, Your Honor.

THE COURT: I'm not sure what that means, informal. If they are considered directly or indirectly, at least they fall within the *prima facie* definition of what should be an administrative record. Maybe there's some privileges there, but I -- it seems to me that -- I'm not sure what that means, informal.

MR. MARTIN: Well, so in the context of that paragraph, Your Honor, what we were trying to say was that we are including materials that would normally be deliberative. Because of the statutory framework, the statute requires DHS to consult with other relevant government agencies, so the State Department for instance. And so materials that in the -- you know, in other types of APA cases would have been deliberative, we are going to be waiving deliberative process privilege rules because of the statutory framework.

THE COURT: Right.

MR. MARTIN: And so in the same informal deliberations, we were saying that we were -- you know, because although we were, you know, waiving privilege with respect to these things under the statute, informal communications and e-mails between various people would be excluded from the record.

THE COURT: Why would those be excluded at least under

the normal definition of administrative record as long as it was up for consideration? It was -- again, even indirectly considered, it should be part of the administrative record.

MR. MARTIN: Well, I think the point was that they're informal deliberations. So, you know, they're deliberative in nature not factual in that those would be normal we will be withholding.

THE COURT: Is that because of the deliberative process privilege or you don't think that that even falls within the definition of what's in the administrative record?

MR. MARTIN: Well, it would depend upon a particular document. Sorry. It's hard -- a little bit hard to answer that in the abstract, so I would say both, Your Honor. I mean, because some would be deliberative process and then others would be materials we would not consider to be part of the record.

THE COURT: All right. What's -- who's going to argue on the part of the --

MR. ARULANANTHAM: Your Honor, I hope after I finish this or at some point before we go, you'll give us a chance just to say two or three very quick things on the equal protection and the due process claims. It will be very fast. I hope --

THE COURT: Why don't you --

MR. ARULANANTHAM: Do that now?

THE COURT: You mean on the merits?

MR. ARULANANTHAM: Yes.

THE COURT: Well, why don't you say that now because I want to move to the next stage.

MR. ARULANANTHAM: Sure, Your Honor. Just to refer the Court to, this is now the children's claim, *Martinez deMendoza* is a Third Circuit case that says if you're going to an unsafe country, the analysis might be different on one of these *de facto* deportation claims; *Israel v. INS*, which is a Ninth Circuit case cited in the *Bustamante* decision where they hold that conditioning of voluntary departure grant on the promise that the person not marry violates the right to family integrity; and we cite those only to say that we do think there is balancing here. If the Court agrees, if you can get us that far, then we're in a factual dispute, and we'll bring experts to show the interest and things like that, so we should survive the motion to dismiss if there is any balancing at all to be done on the due process point.

And then the only other point my co-counsel asked me to suggest is I know that the Court is -- obviously it's very difficult for everyone with the Muslim ban decision coming. I wonder if we might allow supplemental briefing on the equal protection claim depending on what the decision says.

THE COURT: I may do that.

MR. ARULANANTHAM: It's something that the Court can

consider.

On the discovery questions, Your Honor --

THE COURT: Yes.

MR. ARULANANTHAM: -- so I think the first thing we would want is for the defendants to respond to the discovery requests because we're past 30 days, or the Court to deem them waived, I suppose, is the other option. When we had the meet and confer at the Court's -- because the Court had ordered it on May 8th, and so the responses were due June 7th. This is -- I'm not talking here about the administrative record; the other discovery requests that we've made. Those were very targeted, focused on the particular claims that we're talking about here today.

For example, the government said in our discussions, our meet-and-confer discussions, that there are documents responsive to Interrogatory 1, it's the only interrogatory, and RFP1, which are guidances or policies about what criteria to consider in the decision. That seems --

THE COURT: And that would fall within the rubric of an administrative record; right?

MR. ARULANANTHAM: I don't know if it would or not.

THE COURT: Why wouldn't it?

MR. ARULANANTHAM: Because at least they -- as they are defining it, I'm not sure that it would be something that was considered by the -- by the Secretary. If there was law,

say, from 1995 and some policy guidance that then was the governing law and the Secretary never looked at it and then disregarded it, then I'm not sure. I don't know what they -- what their conception is. But in our view, it doesn't matter whether it's not in the administrative record. It goes to the unexplained departure claim. It is an exception to the rule that you are limited to the administrative record. Under the Ninth Circuit law, the *Center for Biological Diversity* case, which they cite, says that if the agency has not explained its decision, that's one reason why you might be able to go outside the administrative record.

THE COURT: Well, here there's a little bit of a chicken-and-egg problem, that is whether there was a change in decision, and part of your discovery kind of goes to that question. So it's a little bit of a cart -- which is the cart and which is the horse here.

MR. ARULANANTHAM: Well, I think -- but don't we get the benefit of the chicken-and-egg difference there? Because we have pled that there is a new rule, and now we get to -- assuming that we have pled enough to survive the motion to dismiss, then we should be able to get discovery on that question. RFP1 -- and it shouldn't -- it doesn't have to be limited to the administrative record if what we -- the claim we're making is that there's an unexplained departure. So that's one.

Another one, Your Honor, RFP4 asks for communications with outside entities, like Congress or some nongovernmental organizations like anti-immigrant organizations, asking for what communications they had with the government about TPS and what the government said to them. Those also might help to prove the equal protection claim or the new rule claim.

RFP6 and 7 is about the testimony, the materials that were given to the Secretaries when they presented their testimony. That's the testimony that I and my co-counsel were quoting to you, Your Honor, where they sort of sound like they're saying that they're limited to the originating conditions. We've gotten no response to those.

Again, in our meet and confers, the government said we think -- I don't want to put words in my friend's mouth, but something like they have a person going to look to see if there is a packet of material that was given to the Secretary to prepare them for the testimony. We would like to see the document that was produced. They've had it now for almost 60 days. So that's our first ask about discovery separate from this administrative record question.

And those -- so the last one I should mention, Your Honor, the 30(b)(6) deposition.

THE COURT: So the ones that you are prioritizing are requests RFP1 --

MR. ARULANANTHAM: 4.

THE COURT: -- 4.

MR. ARULANANTHAM: 6, 7, the 30(b)(6) deposition, and maybe -- these are in the brief we filed yesterday, Your Honor, so -- in the section of it about the old requests. I may be missing one, but that's -- that's one ask that we have.

THE COURT: And there are supplemental requests.

MR. ARULANANTHAM: Yes. So the supplemental requests, Your Honor, I think they sort of circle back to this question we had at the very beginning about whether we should -- whether we're doing now jurisdictional discovery to prove subject matter jurisdiction.

THE COURT: Well, your position is that we don't need to because the challenge that the government has brought is of a legal nature, a facial nature, and I have to resolve this -- really interpretation of 1254a is a critical question; and if that -- if I resolve that in favor of the plaintiffs, then there is at least jurisdiction for purposes of considering the rest of the case.

MR. ARULANANTHAM: That's right, Your Honor. And so Your Honor's order said tell us -- tell the Court what you would ask for specifically. So we took that order seriously, and we gave you exactly our current best guess as to what we would ask for.

But I think what our preference would be would be if the Court were to say, "I find 1254a does not bar this claim, and

so it can proceed under summary judgment," then we'll -- I mean, it will look a lot like that but, you know, we did that in two days. So, you know, we would propound perhaps some more very targeted discovery focused on proving these particular claims.

THE COURT: So your priority is, right now as we sit here, is Request for Document Productions 1, 4, 6, and 7, and you say 30(b)(6) deposition. That would -- is that about the document-gathering process or the merits?

MR. ARULANANTHAM: It would be about the merits. I think it would be -- I mean, it might cover some of the document-gathering process depending on how we timed it, but I think our primary concern in that would be the two areas: Is there an unexplained departure from prior practice? Was there a conscious, intentional departure from the prior practice? And then, second, race discrimination and what are the mechanisms by which the President's and White House's racist immigration imperatives were brought to bear on the TPS decision-making process.

THE COURT: Well, that's biting off a lot for a 30(b)(6) deposition, isn't it?

MR. ARULANANTHAM: Perhaps, Your Honor. Maybe. But, anyway, my point is those are the things that we would prioritize because we're interested in targeted discovery to get the preliminary injunctions off the ground.

THE COURT: All right. Well, let me -- yeah, go ahead.

MR. ARULANANTHAM: You had asked about the timing for Sudan and Nicaragua.

THE COURT: Yes.

MR. ARULANANTHAM: In our discussions when they were describing the size of the administrative record that they want to produce, they're very small. And when you look at these requests that we have focused on as well, I suspect the volume of documents for at least the ones that I just mentioned to you must be extremely small. And so we don't believe that there's a justification for limiting those to only one or two countries.

And also just thinking out -- and, of course, this is, knock on wood, only if we win -- defeat the motion to dismiss, but if we don't do it that way, Your Honor, we're going to file *seriatim* preliminary injunction motions, which is going to be bad.

THE COURT: So what you are intending is one master preliminary injunction hearing?

MR. ARULANANTHAM: Yes. If we have -- we may have enough already. We've done a lot more investigation since we were here a month ago. But if we got the discovery responses, and my conception of what these discovery responses are I think would apply across the decision-making process generally, our

hope would be to file one preliminary injunction motion.

THE COURT: And let me ask, whether you call it jurisdictional discovery or not, one of your burdens, it seems to me, is to make your case that there has, in fact, been a change, that there is -- that's a lot about what we've been discussing. Do the supplemental requests go to that question on the merits?

MR. ARULANANTHAM: Some of them go to that question and some of them go to equal protection questions. I'm prepared to talk about -- if you have questions, I'm prepared to talk about those particular requests because some of them are very specific as I'm sure you can see.

But our main reason for raising this point about whether it's jurisdictional discovery, or instead sort of pre-summary judgment discovery, is because we would prefer not to have had to produce that now and instead be allowed to get the responses to the discovery we propounded 60 days ago, see what's in there, and then, you know, perhaps proceed further.

And it seems somewhat unfair. Obviously, the Court has been extremely fair. I don't mean to suggest in general. But we shouldn't have to do jurisdictional discovery now on what is a merits question without first seeing the responses to the discovery that we already propounded.

And, you know, as I said, we read Your Honor's comments last time to say that we ought now to be in a position to

discuss the actual discovery disputes. And obviously we can't do that because they haven't responded. We don't know. They haven't said that they have documents or don't specifically. They haven't said what objections they're going to raise. So that's why our position -- and they've blown the deadline on responding.

THE COURT: What's your position with respect to the production of the administrative record? Let's say discovery is ordered, responses are ordered to these -- at least to the request for production, and we'll have to talk about the 30(b)(6) deposition, what's your view about the production of the administrative record?

MR. ARULANANTHAM: Given the size that they have described it to be, the Court should order they should produce it in 14 days, should order it -- excuse me, should order that it be produced -- I think we said 4 to 10 days rolling production and then 14 for objections. So assuming there's not a basis to -- yeah, so then, you know, it ought to be 10 days or 14 days.

And also, Your Honor, this is something from the ***Regent's*** order, that if they are excluding evidence from the administrative record based on what would have been an assertion of privilege, the discussion that you and my friend were having earlier, that they log that so that we treat the documents that would otherwise have been properly in the

administrative record but were excluded on the basis of privilege as though they are withheld documents for which we could then challenge them.

THE COURT: All right. And looking forward, what is the timing of the next series of events here given the -- what's going to happen towards the end of the year, November?

MR. ARULANANTHAM: We want to file -- we haven't figured out the exact timing, but I think somewhere in August-September, somewhere in there we want to file a preliminary injunction motion. And so we want the documents in two weeks if we're -- no later than that; and then if we're going to have discovery disputes, as Your Honor had suggested, we'll have them during the summer.

As for interlocutory, I don't know if it would be interlocutory, but appeals, Your Honor, if any of the case survives, our preference would just be to do it simultaneously, which I know is hard for everyone, but it's really hard for our clients to live with this, you know, sort of hammer hanging over their heads, and the decisions that they're making are extremely, extremely hard. So I think if we have to litigate into -- in the Ninth Circuit and the District Court at the same time, I think we'd rather do that than wait longer to put them in even more of a difficult position as the deadlines come closer.

THE COURT: You mean to have an omnibus -- I'm not

sure what you mean. You mean to have one single preliminary injunction hearing?

MR. ARULANANTHAM: Correct, Your Honor. I was just referring to -- Your Honor had said, "Oh, well, whichever way my ruling goes, we might want time for -- on the motion to dismiss." I mean, we might want time for interloc -- I mean, appellate review.

THE COURT: I was talking about appellate review if we got to the stage of preliminary injunction because that's where the rubber hits the road.

MR. ARULANANTHAM: I understand, Your Honor.

THE COURT: I wasn't talking about granting a 1252 interlocutory appeal on a motion to dismiss because there will be time enough. That's why I want to advance the preliminary injunction because then the merits of whatever we rule today here, if it goes forward, can be heard in one, rather than trying to chop it up in pieces. But it does put a premium in getting this heard well in advance of the November date.

MR. ARULANANTHAM: Yes, Your Honor.

THE COURT: So you're looking at an August or September filing?

MR. ARULANANTHAM: Yes. To be honest with you, we haven't internally talked to fix a date because we wanted to come here and argue the motion to dismiss, but we'd be happy to provide very shortly with the Court -- to the Court and to the

government the date by which we'll file the preliminary injunction.

THE COURT: All right. Well, let me --

THE CLERK: At the last hearing we set a preliminary injunction hearing.

THE COURT: We already set a date, I guess.

MR. ARULANANTHAM: We set a date for the hearing, yes, which was September something. I can't remember.

THE COURT: And I think didn't we set a date for --

THE CLERK: The motion to be filed August 23rd.

MR. ARULANANTHAM: August 23rd, yes. Thank you so much.

THE COURT: So we did get ahead of ourselves. We did set a date already.

So that means discovery matters have to be resolved quickly.

MR. ARULANANTHAM: I apologize, Your Honor. I had forgotten that we had fixed that precise date.

THE COURT: All right. Let me hear from -- the government's response.

What's wrong with producing responses to requests for productions 1, 4, 6, and 7?

MR. MARTIN: Well, if we're moving past the record for the moment, Your Honor --

THE COURT: Yeah.

MR. MARTIN: -- I could just give you an update on where we are.

For Number 4, that is an exceptionally broad request that involves -- would involve looking through the files of numerous agency people. I mean, this is, you know, not a targeted, discrete request.

THE COURT: But the subject matter is fairly discrete. It's about the decision to extend or terminate the designations for these four countries, which all occurred after -- what was the first decision date or discussion on this?

MR. MARTIN: November 2017, I believe.

THE COURT: Interrogatory Number 1 sets a date of November 8th, 2016. I forget what the significance of what that date is. Is that --

MR. MARTIN: I believe it's the election date itself.

THE COURT: Oh, okay. Yeah, that was the election date, wasn't it?

So it means for a period of about a year, maybe a little more than a year about these four, and I don't know how many -- I mean --

MR. MARTIN: So maybe it would help elucidate this point if I sort of gave you the numbers on what we have for some of the other --

THE COURT: Yeah.

MR. MARTIN: So for some of the requests that were --

that we were able to formulate meaningful search terms for, for example, Request Number 2 and 3, we have found a total of almost 7,000 documents. For 6 and 7 -- and it's 14,000 documents and families.

THE COURT: For 6 and 7?

MR. MARTIN: No, that was for 2 and 3.

THE COURT: Oh.

MR. MARTIN: For 6 and 7, we're looking at about 13,000 documents based on our current search terms.

THE COURT: Those are the number of documents used to prepare Secretary Kelly and then Secretary Nielsen for their testimony?

MR. MARTIN: We're reviewing them to make sure that they're responsive, but based on -- those are the numbers that have come back for the search terms we formulated for those.

And, similarly --

THE COURT: I find it a little hard to believe that the Secretary reviewed 12,000 documents to prepare for -- I mean, maybe I underestimate. I assume that would be narrower once -- well, go ahead.

MR. MARTIN: Well, it probably will be narrower once they're actually reviewed. You know, these are -- the search terms are just the first sort of step in trying to isolate these documents.

THE COURT: Yeah.

MR. MARTIN: I'm just trying to give you a sense of, you know, how much material is out there because of, you know, the vastness of the government agencies and the number of people and the custodians involved. You know, this isn't a situation where there's just, you know, one file box with everything, and so --

THE COURT: But it's a pretty discrete subject matter. I mean, if you look -- the key seems to be 1 and 4. One is statements, documents about what factors to consider and whether to extend or terminate. You know, I don't know how much there will be. That's about the criteria, not the actual decision itself, as I read it. And there may not be any. You say that there was no change. Your response may be there's no documents in that regard. I don't know.

And then 4 is the one that kind of gets to the nub of, you know, what documents were actually considered or what communications there were regarding the decision to terminate, and that seems to me something very closely aligned with what would have to be produced in the administrative record anyway.

There's discussions, considerations, communications about terminating the designations for these four countries. That's what's at issue here. So that's why I asked the question actually: Wouldn't this be in the administrative record anyway because if it is, what's the harm in getting that produced whether by way of handing over the administrative record or

doing an advance portion of the administrative record? It seems like this is well within what would normally have to -- you know, what would be produced if there were an administrative record.

MR. MARTIN: I think it's certainly true for Number 1, Your Honor, or Interrogatory Number 1 and RFP Number 1. Four would be a little bit different because we're talking about, you know, communications with members of Congress, international bodies, nongovernmental organizations. You know, I don't know that that is typically the type of material that would be in the record depending upon who it's coming from within the agencies.

THE COURT: Let me ask -- let me ask the plaintiffs then. Correspondence with members of Congress, why is that -- what's the relevance of that?

MR. ARULANANTHAM: Two ways. There are a number of members of Congress who wrote advocating the extension of the TPS decisions that then were -- resulted in terminations. The responses to those may manifest a legal interpretation.

And then on the other side, there were Congresspeople who I think were supportive of the termination of TPS, and those communications also may manifest either as to the equal protection claim or as to the APA claim.

The other one in there, Your Honor, is about nongovernmental organizations. The complaint -- I think it may

be something we discovered after and is in the response to the motion to dismiss and not in the complaint, but there was communication from anti-immigrant organizations -- well, anti-immigrant organizations, I think it's the Center for Immigration Studies or perhaps it's FAIR, they listed this, the need to end TPS as one of their kind of priority immigration goals.

THE COURT: So, in other words, this may shed light on sort of the knowledge and state of mind and position of the agency, so it's not -- and this could be post -- post-decision?

MR. ARULANANTHAM: It could be, Your Honor. But the fact -- a trier of fact would get to look at even a post-decision.

THE COURT: Right. So there's where the difference is between the administrative record, which is generally predecisional, things considered, versus probative value of the state of mind after, and therein lies the difference. Because if you're asserting an equal protection violation, an invidious purpose, then post-decision statements can shed light as probative of what -- that's why you have to go beyond. That's your argument why you go beyond the administrative record.

MR. ARULANANTHAM: Absolutely, Your Honor. So the President's statements about Haiti and El Salvador may shed light on the motive on Sudan and Nicaragua even though those decisions had already been made.

THE COURT: And with respect to the 30(b)(6), your plan would be once you get these documents and presumably the administrative record, you would be prepared to do a 30(b)(6) deposition on all these topics?

MR. ARULANANTHAM: You know, we haven't spoken internally about whether the topics are two disparate and whether we would want two witnesses for half a day instead of one for seven hours. That's the discussions we haven't had. But, yes, we would want to have a 30(b)(6) deposition to cover at least the two big buckets, you know, the -- I don't think the due process claim for the children requires a lot of discovery, but the other two, the APA and the equal protection claim, do potentially.

THE COURT: All right.

MR. ARULANANTHAM: One other thing, Your Honor, when my friend says it's overbroad, there's a lot of documents. Your Honor wanted us not to be in this position today, you know, and then we should have gotten their objection, and we should have had a meet-and-confer about why we need to narrow the search terms.

We repeatedly asked them, we said, "Tell us the search terms you're using because we want to narrow them," and they weren't willing to do that today. So I think -- I'm not sure they should be getting the benefit of saying that now when they had the opportunity to have a substantive discussion, and we

could be arguing here about why is your search pulling whatever it was, tens of thousands of documents for this testimony preparation.

There must be a packet that was given to the Secretary, "These are the things that you should read in preparation of your testimony." Why are they doing search terms?

THE COURT: All right. Let me ask counsel for the government.

First, is there any reason why you can't produce the administrative record since you've been working on it for some time now and you have a good fix at least of what you think the administrative record is?

And I hope you will take into account the Court's comment about the breadth of the administrative record extending to those materials directly or indirectly considered by any agency decision-makers, why they can't be produced, let's say, in 10 days?

MR. MARTIN: I know that we are able to do that for Sudan and Nicaragua. There are three or four days of technical work that has to be done that gets built into our production deadline.

I know that we could do that for Sudan and Nicaragua, and I would ask for Haiti and El Salvador to be able to produce two weeks after that.

THE COURT: All right. Well, let me -- and with

respect to -- so you've not had a meet and confer with counsel with respect to Request for Productions 1, 4, 6, and 7?

MR. MARTIN: We've had two conversations about where we stood; and the fact that we were producing documents, I think plaintiffs' counsel thought we were going to be in a position to say, "You know, here are the X number of documents," and we can -- we give you objections to each one, or something. I'm not quite sure what they thought we would be doing.

But I want to emphasize how much work we have been doing in compiling these documents, and it is more laborious than I think plaintiffs believe, but that is the case.

You know, if -- you know, the numbers I gave you just now were just for, you know, just a handful of those documents, and so -- or a handful of those requests, rather.

THE COURT: Well, all right. So let's put it this way: I'd like you to meet and confer right after this hearing to talk about the specifics of Requests 1, 4, 6, and 7, and for you to explain what it is you -- the complications and the scope issues and the search terms, that kind of stuff, to see whether there's something you-all can agree to to work that out more quickly.

And I will say that my inclination is that -- and I will get out a ruling quickly, if nothing more than a skeletal ruling at least at first so that you know where we're headed

with respect to the motion to dismiss.

Should this case or parts of this case survive, then I am inclined to order the production in responses to 1, 4, 6, and 7; and for then also the parties to meet and confer about the possibility of a 30(b)(6) deposition, and to order that the administrative record be produced quickly because we are coming up upon an August 23rd deadline for filing of a brief, if we get to that point, opening brief on a preliminary injunction motion. And we don't have time to really delay that because then we're -- you know, the hearing is not until September, and we need to hear this matter before then -- by then.

So with that, I'm going to take the matter under submission, and then get out a ruling fairly quickly once I've reviewed some more of the cases that you-all have cited.

And then I'd like you to meet and confer on a provisional production or at least provisionally conditionally on if this case were to proceed on the discovery matters that I just mentioned.

MR. MARTIN: And just to follow-up on the deadlines for the administrative record, we're going with 10 days from today for --

THE COURT: I'll say this for now: I would say 10 days for Sudan and Nicaragua, and within a week after that for El Salvador and Haiti. All right?

All right. Thank you.

MR. ARULANANTHAM: Thank you, Your Honor.

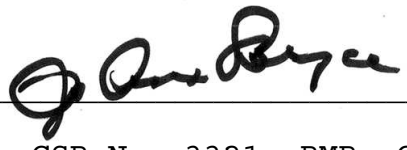
(Proceedings adjourned at 12:48 p.m.)

---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, June 28, 2018



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter